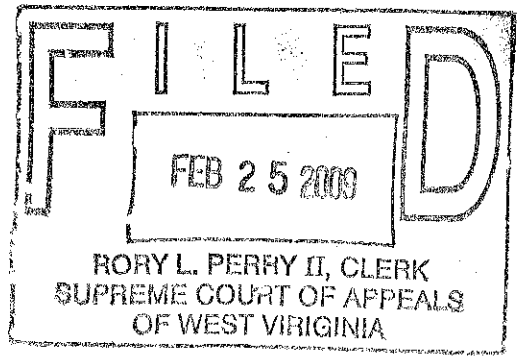
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 082094

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Plaintiffs below and
Respondents,

v.

SKYLINE CORPORATION,
Defendant below and
Petitioner.



BRIEF OF PETITIONER

From the Circuit Court of
Jackson County, West Virginia
Civil Action No. 05-C-50
Judge Thomas C. Evans, III

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Kind of Proceeding and Nature of Ruling Below

Plaintiffs purchased a manufactured home in 1995 which was constructed by Skyline Corporation ("Skyline") which incorporated certain building materials supplied by Georgia-Pacific Corporation ("G-P") in the construction of the Plaintiffs' home. Ten years later, April 11, 2005, the Plaintiffs filed suit against Skyline and others[1] alleging, among other claims, that exposure to formaldehyde in the building materials supplied by G-P and used by Skyline caused them to vacate their home. Plaintiffs are not making *any* physical injury or health claims in this case. See pages 1 and 4 of Plaintiffs' Response to Petition for Certified Question ("Plaintiffs' Response").[2]

Skyline filed a motion to dismiss based upon, among other grounds, federal preemption of the Plaintiffs' formaldehyde based claims. After discovery, the same legal grounds were raised by motion for summary judgment. By Orders entered October 10, 2007 and July 22, 2008, the trial court dismissed some but not all claims. The claims at issue in this certified question appeal are the only surviving claims. The trial court held that the Plaintiffs' formaldehyde based claims were not preempted by federal law and denied the motion for summary judgment on those claims filed by Skyline. By Order entered August 11, 2008, the trial court certified the following questions of law to this honorable Court:

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[1] All other Defendants have settled and have been dismissed from this action. All other claims against these remaining Defendants have been dismissed or withdrawn.

[2] Curiously, Plaintiffs claim that the remaining claims are simple negligence claims arising out of sawdust and wood chips being found in the ductwork of their home but deny any personal injuries or damage therefrom. Damages however, are an essential element of the negligence cause of action. *Sewell v. Gregory,* 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988).

1. Does the preemption provision found at 42 U.S.C. § 5403(d)[3] preempt and bar Plaintiffs' common law negligence claim based upon formaldehyde exposure when the Plaintiffs do not claim, and cannot establish, that the Defendants failed to comply with the formaldehyde standards established in 24 C.F.R. §§ 3280.308 and 3280.309?

ANSWER: NO.

2. May the Plaintiffs present evidence of ambient air testing for the presence of formaldehyde in support of their common law negligence claim when HUD specifically considered and rejected the ambient air standard that plaintiffs want to present to a court and jury as the standard of care.

ANSWER: YES.

3. Does the "savings clause" of 42 U.S.C. § 5409(c) preclude the Court from granting the Defendants' motions for summary judgment when despite the legislative history which establishes that it was is HUD's intention that federal standards preempt State and local formaldehyde standards in accordance with 42 U.S.C. 5403(d))?

ANSWER: YES.

Petitioners ask this Court to hold that: (i) the preemption provision found at 42 U.S.C. § 5403(d) preempts the Plaintiffs' formaldehyde based claims in their entirety; (ii) Plaintiffs may not introduce evidence of ambient air testing for formaldehyde in support of their common law negligence claim and (iii) the "savings clause" of 42 U.S.C. § 5409(c) does not preclude the Court from granting the Defendants' motions for summary judgment.

[3] 42 U.S.C. § 5403(d) provides that whenever a federal manufactured home construction and safety standard is in effect, no State shall have any authority either to establish, or to continue in effect, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

Statement of Relevant Facts

In September 1996, the Plaintiffs purchased a new manufactured home[4] from Gregory Adams d/b/a Bob's Mobile Homes. The home was constructed by Skyline and shipped to Bob's Mobile Homes on September 25, 1995. Skyline used certain building materials which were supplied by Georgia-Pacific Corporation ("G-P") in the construction of the Plaintiffs' home.

After Bob's Mobile Homes delivered, installed, and finished constructing the Plaintiffs' manufactured home, Plaintiffs made a series of modifications to their home, including the addition of 3 decks, a walk-in closet, the addition of hardwood flooring and the construction of an addition to the home which was completed in 2002. None of this construction work was done by or approved by Skyline, nor did Skyline provide any of the construction materials.[5] Plaintiffs testified that they began to experience health problems after they replaced the factory flooring with hardwood flooring and made other modifications to their home. Skyline suggests that the completion of the Plaintiffs' projects six years after they moved into their home coincides with the onset of their claimed symptoms. Plaintiffs represent in their Response that after they lived in their home for six years they "began to experience various health problems". Response at page 3.

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[4] A "manufactured home" is "a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary and complies with the standards established under this chapter; and except that such term shall not include any self-propelled recreational vehicle." 42 USC §5402(6).

[5] In fact, Plaintiffs' modifications to the home would take the home out of HUD Code compliance and void Skyline's express warranty to the extent that any warranty claim could be made at all ten years after purchase.

The Plaintiffs allege that the sudden onset of their symptoms is tied to the presence of formaldehyde vapors despite the testimony of their own expert witness that formaldehyde vapors from building products decrease, not increase, over time. *See*, Trial Court Finding of Undisputed Material Fact No. 19, Record at page 30. Simply put, at the time the Plaintiffs started having problems with their home, the home has been altered significantly and was not the home Skyline constructed 1995.

On April 11, 2005, more than two years after Plaintiffs claim to have suffered health problems due to formaldehyde exposure, and nearly a decade after the manufactured home was constructed and sold, Plaintiffs filed this civil action.

Argument

I. STANDARD FOR CERTIFICATION AND STANDARD OF REVIEW

West Virginia Code §58-5-2 provides that any question of law relating to the sufficiency of a motion for summary judgment when the motion is denied may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision. In this case, the Petitioner sought dismissal and summary judgment of certain claims on the basis that those claims were preempted and barred by application of controlling federal law. The trial Court denied the Petitioner's motions on the grounds that the claims and issues were not preempted.

The certified questions now before this Court present matters of first impression[6] in West Virginia and those issues are the subject of only a few reported decisions nationwide. The questions presented are dispositive of all remaining issues in this civil action.

The "standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus point 1, *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998); Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

II. THE FEDERAL GOVERNMENT BALANCED COMPETING INTERESTS AFFECTING INTERSTATE COMMERCE AND CONSUMER RIGHTS WHEN IT ENACTED THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT AND THE FEDERAL REGULATIONS PROMULGATED PURSUANT TO THE ACT.

A. CONGRESS INTENDED THAT FEDERAL STANDARDS WOULD SUPERSEDE STATE STANDARDS WHICH WERE NOT IDENTICAL TO THE FEDERAL STANDARDS.

The National Manufactured Housing Construction and Safety Standards Act authorized the Secretary of the Department of Housing and Urban Development (hereinafter "HUD") to establish manufactured home construction and safety standards. 42 U.S.C. § 5401. The legislative history provides that HUD was to establish standards "which would supersede State standards not identical to the Federal standards." S.Rep. No. 93-693, 93rd Cong; 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4279. The HUD standards "would have to equal or exceed State standards now in effect and would preempt State law." *Id.* at 4340 (emphasis added). The Senate Report explains that "[s]tates would be permitted to retain jurisdiction under

[6] The Court has considered other preemption issues in other industries and in other contexts in the past. See syl. pt. 1, *Davis v. Eagle Coal and Dock Co.*, 220 W. Va. 18, 640 S.E.2d 81 (2006), noting that the Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law.

State law over a mobile home safety issue where there is no HUD standard." *Id.* at 4279 (emphasis added).

When the Senate bill was in joint conference, the conferees deleted certain portions of the bill which gives insight into their intent with regard to the preemptive effect of the Act and its regulations thereunder. Specifically, the conferees deleted a section which provided homeowners with a private right of action to recover damages from the manufacturer for failure to meet the Federal standards. *See* Conf. Rep. No. 1279, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.A.N. 4449, 4487-88. *See also* 120 *Cong. Rec.* H28,376 (daily ed. August 15, 1974). This deletion made sense because Congress included in the Act a provision mandating that the States may retain jurisdiction regarding mobile home safety issues only where there is no HUD standard, S. Rep. No. 693, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.A.N. 4273, 4279, and had already specifically provided that if a state wanted to participate in the enforcement of Federal standards, it must submit to HUD a plan for enforcement meeting certain requirements, and which subjects the state to a reporting requirement. 42 U.S.C. § 5422.

The conferees also deleted a warranty provision which included a clause that provided for consumers to "retain any other rights under State law." *Compare* S. Rep. No. 693, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.A.N. 4273, 4414 *with* Conf. Rep. No. 1279, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.A.N. 4449, 4487-88 *and* 120 *Cong. Rec.* H28,376 (daily ed. August 15, 1974). Senator Taft, who had been deeply involved in formulating the Senate bill, pointed out that absent a warranty provision, the bill provided no recourse for the consumer if the home did not meet the standards. S. Rep. No. 693, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.A.N. 4273, 4447. There is no issue in this case

however about failure to comply with any such regulation because Plaintiffs concede that "all products in the home would be allowed under all federal regulations . . ." Response at p. 5. Moreover, the Plaintiffs agree that "any state regulations that would differ from the product standard would be preempted." *Id.*

B. FEDERAL REGULATORS CONSIDERED AND BALANCED VARIOUS FORMALDEHYDE METHODS OF CONTROLLING AND MINIMIZING ADVERSE HEALTH EFFECTS BEFORE PRESCRIBING SPECIFIC FORMALDEHYDE STANDARDS WHICH PREEMPT ANY CONTRARY STATE STANDARD

After a rulemaking process which lasted 5 years (1979-84), HUD promulgated regulations in 1984 (hereinafter "HUD regulations") prescribing standards for formaldehyde emissions in manufactured homes. 24 C.F.R. § 3280.308; *see* 49 Fed. Reg. 31,996 (1984). Each standard is required to be reasonable and to provide the highest standard of protection. 42 U.S.C. § 5403(a).

HUD considered two different approaches to regulating formaldehyde in manufactured housing--an ambient air standard and a product standard. The ambient standard would regulate the maximum level of formaldehyde permitted to be present in the ambient indoor air of a manufactured home and would be violated if the formaldehyde level in the ambient air exceeded the maximum formaldehyde level established by HUD. The product standard would regulate the amount of emissions permitted from specific products used in the construction of the home and would be violated if any component product emitted more than the permissible level without regard to how much formaldehyde is actually in the ambient air.

HUD chose the product standard after careful deliberation. An ambient air standard was rejected because of the numerous variables and enforcement problems related to that approach. 48 Fed. Reg. 37,136, 37,139 (1983). HUD determined that formaldehyde

emissions in manufactured homes are erratic and any post-construction factory testing would be unreliable and inconclusive. *Id.* An ambient standard would not work because temperature and humidity would cause variations in ambient levels. *Id.* More importantly, the ambient level of formaldehyde inside a home is subject to the particular living habits of that home's occupants. *Id.* Post-manufacture purchases by the consumer such as furniture will affect the formaldehyde level in the home. *Id.*

> The Department has decided to adopt product standards. The Clayton study cited above establishes that a product standard can be effective and that product test values reasonably correlate to formaldehyde levels in homes. . . .Therefore, based on its effectiveness, the availability of reliable test methods, and the potential to prevent formaldehyde problems before the homes are sold, the Department has concluded that a product standard is appropriate.
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> * * *
>
> HUD's objective in implementing these standards is to reduce the level of formaldehyde within the home environment. It is HUD's intention that these standards preempt State and local formaldehyde standards in accordance with the Act (42 U.S.C. 5403(d)).

49 Fed. Reg. 31,996-97 (1984) (emphasis added).

HUD regulations establish a 0.2 parts per million (ppm) formaldehyde emission standard for plywood and a 0.3 ppm standard for particleboard, as measured by a specified air chamber test. 24 C.F.R. § 3280.308(a). All plywood and particleboard[7] installed in manufactured homes must be certified by a nationally recognized testing laboratory as complying with the federal standards. 24 C.F.R. § 3280.308(b).

[7]This provision applies to plywood and particleboard which are bonded with a resin system or coated with a surface finish containing formaldehyde other than an exclusively phenol-formaldehyde resin system or finish.

Furthermore, the HUD regulations require precise warnings which must be given when a manufactured home is sold. 24 C.F.R. § 3280.309. The regulations mandate the exact language to be used in the notice, the type size to be used, and the manner of posting the notice. *Id.* The warnings, referred to as an "Important Health Notice," must be prominently displayed in the kitchen of the home and included in the homeowner's manual. *Id.*

Although HUD specifically considered and rejected the promulgation of an ambient standard, 49 Fed. Reg. 31,996-97 (1984), the product standards were designed to result in a targeted ambient formaldehyde level of not greater than 0.4 ppm. *Id.* at 31,998.

> D. Targeted Ambient Level
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> The Department has concluded that an indoor ambient formaldehyde level of 0.4 ppm provides reasonable protection to manufactured home occupants.
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> * * *
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> HUD believes that the product standards will result in a 0.4 ppm indoor level under the specified conditions and that this level, given economic considerations, is reasonable.

Id. at 31,998-99. Plaintiffs' formaldehyde ambient air testing reveals formaldehyde vapors at 0.066 ppm, on April 9, 2006, compared to the federally approved target value of 0.4 ppm, or about 16.5% of the approval target.

In the Manufactured Housing Act, Congress expressly stated its intent that the federal formaldehyde standards preempt state law with respect to matters covered by the Manufactured Housing Act.

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured

> home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d). Such intent is clear in the legislative history: "States would be permitted to retain jurisdiction under State law over a mobile home safety issue where there is no HUD standard." S.Rep. No. 93-693, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4279 (emphasis added). The HUD regulations also contain a similar preemptive statement, 24 C.F.R. § 3282.11(a), and specifically provide that:

> [n]o State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.

24 C.F.R. § 3282.11(d) (emphasis added). HUD also stated its intent that the "standards preempt State and local formaldehyde standards" in its report when the regulations were promulgated. 49 Fed. Reg. 31,997 (1984).

The "American Homeownership and Economic Opportunity Act of 2000" strengthened the preemption provision at issue.

> Enacted in December 2000, the American Homeownership and Economic Opportunity Act of 2000 amended *42 U.S.C.A. § 5403(d)* to include a paragraph stating that: "Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this chapter. Subject to *section 5404* of this title, there is reserved to each State the right to establish standards for the stabilizing and support systems of manufactured homes sited within that State, and for the

> foundations on which manufactured homes sited within that State are installed, and the right to enforce compliance with such standards, except that such standards shall be consistent with the purposes of this title and shall be consistent with the design of the manufacturer." Pub.L. 106-569, Title VI, § 604, Dec. 27, 2000, 114 Stat. 2999. This amendment was to provide explicit statutory support for the HUD regulation at *24 C.F.R. § 3282.11* which interprets the preemptive effect of *§ 5403(d)* of the Act, which was enacted in response to the 1998 Eleventh Circuit decision in *Georgia Manufactured Housing Ass'n., Inc. v. Spalding County, Ga., 148 F.3d 1304, 1309 fn. 8 (11th Cir. 1998)*, which raised a concern as to whether the regulation was valid because in the court's view that the regulation "seem[ed] to expand the scope of the unambiguous preemption provision enacted by Congress." *68 Fed. Reg. 42327, 42328 (July 17, 2003)*
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> *Guidroz v. Champion Enterprises*, 2007 U.S. Dist. LEXIS 77611 (W.D.La. January 26, 2007).

Petitioner asks this Court to compare the review processes involved in pre-market approval of the medical device in the *Medtronic* case with the deliberative process used by HUD to promulgate the formaldehyde standard. In *Medtronic*, the Court discussed the approval process:

> Premarket approval is a "rigorous" process. *Lohr*, 518 U.S., at 477. A manufacturer must submit what is typically a multivolume application. FDA, Device Advice- Premarket Approval (PMA) 18, http://www.fda.gov/cdrh/ devadvice/pma/printer.html. It includes, among other things, full reports of all studies and investigations of the device's safety and effectiveness that have been published or should reasonably be known to the applicant; a "full statement" of the device's "components, ingredients, and properties and of the principle or principles of operation"; "a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and, when relevant, packing and installation of, such device"; samples or device components required by the FDA; and a specimen of the proposed labeling. §360e(c)(1). Before deciding whether to approve the application, the agency may refer it to a panel of outside experts, 21 CFR §814.44(a) (2007), and may request additional data from the manufacturer, §360e(c)(1)(G).

> The FDA spends an average of 1,200 hours reviewing each application, *Lohr, supra,* at 477, and grants premarket approval only if it finds there is a "reasonable assurance" of the device's "safety and effectiveness," §360e(d). The agency must "weig[h] any probable benefit to health from the use of the device against any probable risk of injury or illness from such use." §360c(a)(2)(C). It may thus approve devices that present great risks if they nonetheless offer great benefits in light of available alternatives. It approved, for example, under its Humanitarian Device Exemption procedures, a ventricular assist device for children with failing hearts, even though the survival rate of children using the device was less than 50 percent. FDA, Center for Devices and Radiological Health, Summary of Safety and Probable Benefit 20 (2004), online at http://www.fda.gov/cdrh/pdf3/H030003b.pdf.

Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1004 (2008).

> [I]n the context of this legislation excluding common-law duties from the scope of pre-emption would make little sense. State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. As Justice Breyer explained in *Lohr*, it is implausible that the MDA was meant to "grant greater power (to set state standards 'different from, or in addition to' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." 518 U.S., at 504. That perverse distinction is not required or even suggested by the broad language Congress chose in the MDA, and we will not turn somersaults to create it.

Id., 128 S. Ct. at 1008. HUD undertook extensive investigation, considered numerous alternatives, no less rigorous than that used by the FDA, and made difficult choices balancing the interests of consumers and affected industry segments before adopting the specific regulatory

standards at issue in this case. HUD conducted a cost benefit analysis like the cost benefit analysis referenced by the *Medtronic* Court. *Id.* at pp. 32002 – 03. *See also New Mexico v. Department of Housing and Urban Development,* (Petition to Review HUD's formaldehyde rules discussed herein)(Docket No. 84-2347, 10th. Cir. 1/7/1987). HUD's conclusions are entitled to the same deference before this Court as FDA's conclusions were afforded before the United States Supreme Court. HUD conducted a cost benefit analysis like the cost benefit analysis referenced by the *Medtronic* Court. 49 FR at pp. 32002 – 03.

C. THE TRIAL COURT FAILED TO GIVE EFFECT TO THE IMPORTANT PUBLIC POLICY CONSIDERATIONS BALANCED BY THE UNITED STATES CONGRESS

The trial court concluded that Plaintiffs' claims related to formaldehyde are not preempted by the National Manufactured Housing Construction and Safety Standards Act nor by the regulations promulgated thereunder. Conclusion of Law No. 55. The Court relied upon State Court cases decided in 1991 and 1995 as well as an ALR annotation dated 2001.

The trial court relied primarily upon the analysis of the Court of Appeals decision of *Macmillan v. Redman Homes, Inc.,* 818 S.W.2d 87 (Tex. App. San Antonio 1991, writ denied). More recently, however, the Supreme Court of Texas explained the *McMillan* analysis:

> In *Macmillan*, the plaintiffs brought a wrongful death and personal injury suit against several defendants, including Redman, alleging harm caused by unreasonably dangerous levels of formaldehyde fumes in the home's ambient air. In response, the defendants urged that the formaldehyde levels did not exceed those permitted under the NMHCSSA, which measured emissions in terms of parts per million. *Macmillan*, 818 S.W.2d at 88-89. Essential to the appellate court's analysis was the fact that HUD had considered and rejected an ambient air standard like the "unreasonably dangerous" standard of care the plaintiffs suggested. *See id.* at 90. Thus, the *Macmillan* plaintiffs sought to impose a specific construction or safety standard that clearly conflicted with a federal law or

> regulation pertaining to mobile homes. The Ivys' theories of recovery, in contrast, cannot be said to impose any specific, substantive "standard" on mobile home manufacturers that differs from the NMHCSSA.

Redman Homes v. Ivy, 920 S.W.2d 664, 666-667 (Tex. 1996).

Plaintiffs' claim are more like those in *McMillan* than those in *Ivy*. Plaintiffs do not dispute, and have presented no evidence, that the decking materials used in the construction of their home met all appropriate federal standards. Skyline submits that Plaintiff's claims would not be preempted if they could show that the federal standards were not met, as in *Ivy*, but they cannot pursue any claim when the preemptive standards have been satisfied.

More recently, the *Guidroz* Court discussed federal preemption in the context of manufactured housing. *Guidroz* is not a formaldehyde preemption case but its preemption analysis is instructive. When discussing the interplay between the express preemption, implied preemption and the Savings Clause, the Court noted:

> **II. Implied Preemption**
>
> Although the undersigned has found that plaintiffs' claims are not expressly preempted, that finding does not bar this court from finding that plaintiffs' claims are impliedly preempted. In *Geier,*[8] after determining that the savings clause preserved some common law actions, the Court examined whether the clause went further, preserving all tort actions from ever being preempted. *Geier, 529 U.S. at 869*. The Court concluded that the savings clause **did not** bar the ordinary application of implied preemption principles. *Id.* The Court reasoned that Congress would not enact legislation that required compliance with federal regulation as a precondition, and then allow states to carve away at that regulation through common law private actions that were in conflict. *Id. at 869-870*. Rather, the savings clause serves as a buffer to the express preemption clause allowing for some common law liability while still preserving

[8] *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

> implied preemption principles to protect the overall objectives of the regulatory scheme. *Id. at 870.*

State common law damage suits based upon ambient air standards and testing protocols which were specifically rejected by Congress defeat the overall objectives of the regulatory scheme, conflicts with federal law, and stands as an obstacle to the achievement of federal purposes and objectives as set out in the federal manufactured housing statutes and or regulations.

D. PLAINTIFFS DESIRE TO USE AMBIENT AIR TESTING EVIDENCE YEARS AFTER THE PLAINTIFFS HOME WAS CONSTRUCTED, INSTALLED, DAMAGED, REPAIRED AND ALTERED DEFEATS THE BALANCING OF COMPETING INTERESTS BY FEDERAL REGULATORS AND VIOLATES THE SPECIFIC TESTING PROTOCOLS ESTABLISHED BY H.U.D.

Finally, the claims arising from the formaldehyde issue, which Plaintiffs have alleged arises out of wood dust in the ducts of their manufactured home years after it was purchased, are pre-empted by federal law. Plaintiffs' suggested argument that there is excessive formaldehyde in the ambient air of their home is misguided and does not provide a basis for their claim. Congress has specifically rejected an ambient air standard for manufactured housing and instead, adopted a product standard. *See* 24 CFR § 3280.208(a) (2006) which sets permissible product formaldehyde levels as measured by the air chamber test specified in § 3280.406. Plaintiffs can not enforce a formaldehyde standard which is not identical to the federal standards outlined above. Furthermore, Skyline placed an "Important Health Notice" formaldehyde within the home as required by 24 CFR § 3280.309. While Skyline is required to provide the notice initially, the regulations require the Dealer to actually provide the consumers with a copy of the notice. The is so because the Manufacturer has no control over the placement of the notice after the home is delivered to the retailer.

In *MacMillan v. Redman Homes, Inc.*, the Court of Appeals of Texas, Fourth District, found that "federal law preempts the ambient air standard.....against the manufacturing defendants." 818 S.W.2d 87, 88 (Tex. 1991). Specifically, the court held that "the statutory scheme and the HUD regulations preempt such common-law and statutory damage suits and prevent state courts from litigating formaldehyde levels on any basis that is not identical to the HUD product standards." *Id.* at 89.

The *MacMillan* case is similar to the present matter in that the MacMillans claimed that there was excessive formaldehyde in the air of their mobile home, but made no claim that the manufacturer of the mobile home failed to comply with federal regulations regarding formaldehyde. *Id.* at 88. In the present matter, Plaintiffs have claimed that they were exposed to "toxic levels" of formaldehyde, but do not allege that Skyline failed to comply with federal regulations. See Record at pp. 5-6. Plaintiffs' claims regarding the use of formaldehyde in the manufactured home fail as a matter of law because they are based on an ambient air standard.

II. Formaldehyde Regulation

HUD also went through a detailed balancing of interests to protect the public:

> The Department has decided to adopt product standards. The Clayton study cited above establishes that a product standard can be effective and that product test values reasonably correlate to formaldehyde levels in homes. Products can be tested easily under standardized conditions, which will avoid the problem of compensating for variations in home temperature and humidity levels. Also, a product standard has the advantage of allowing for early detection of a potential formaldehyde problem. Unlike the violation of an ambient standard, which can be established only after a manufactured home has been completely assembled, violation of a wood product standard can be discovered before the wood is shipped by its supplier or installed in a home. Therefore,

> based on its effectiveness, the availability of reliable test methods, and the potential to prevent formaldehyde problems before the homes are sold, the Department has concluded that a product standard is appropriate.
>
> The standards will cover particleboard and plywood, two of the major emitters of formaldehyde in manufactured homes. HUD's objective in implementing these standards is to reduce the level of formaldehyde within the home environment. It is HUD's intention that these standards preempt State and local formaldehyde standards in accordance with the Act (42 U.S.C. 5403(d)).

E. THE SAVINGS CLAUSE DOES NOT PRECLUDE SUMMARY JUDGMENT

The Circuit Court found the savings clause of 42 U.S.C. §5409(c) precluded it from granting summary judgment on preemption grounds. See Certified Question No. 3. However, the Circuit Court's ruling was erroneous. The savings clause found in the Manufactured Home Construction and Safety Standards of 42 U.S.C. § 5409(c) provides:

> "Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law."

See 42 U.S.C. § 5409(c). The United States Supreme Court, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), found that a similar savings clause did not foreclose or limit the operation of ordinary preemption principles insofar as state laws that "actually conflict" with a federal statute or standards. *Id.* at 869. The Supreme Court stated that it has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870.

In this case, there can be no dispute that the Plaintiffs seek to impose standards and duties upon the manufactured housing industry which are contrary to and in addition to the specific and preemptive federal formaldehyde standards. Plaintiffs somehow suggest that a

handful of sawdust and construction scrap (allegedly swept into the ductwork by Skyline in 1995 as compared to Plaintiffs' own construction activities years later) should negate the carefully considered and balanced product standard for formaldehyde. The federal standard would be meaningless if the potential for formaldehyde gas emission from a handful of debris is permitted to outweigh the impact of dozens of sheets of approved floor decking. More importantly, Plaintiffs seek to impose liability based upon a test specifically rejected by federal authorities.

HUD's regulations regarding formaldehyde emissions do not establish a minimum safety standard, rather the "products standard" provides the only acceptable safety standard for the detection of formaldehyde emissions in the manufactured home industry. Federal regulators concluded that their standards would result in a targeted safe value for formaldehyde vapors inside manufactured homes. The evidence in this case confirms the wisdom of the product standard because the Plaintiffs' own testing, using the rejected methodology, confirms that the ambient air in the Plaintiffs' home is substantially below the target value of 0.4 ppm. Congress could not have intended that the savings clause would operate in a way to defeat years of study, testing and deliberation.

More likely, Congress intended the savings clause to permit a state common law action for failure to comply with federal standards. Violation of the federal standards does not give rise to a private federal cause of action, but the violation may still constitute relevant negligent conduct for a state law cause of action. *See, e.g., Whittington v. Patriot Homes, Inc.* 2008 WL 1736824, 5 (W.D.La. 2008); *Richard v. Fleetwood Enterprises, Inc.*, 4 F.Supp.2d 650, 653-55 (E.D.Tex.1998); *Joseph v. Fluor Corp.*, 513 F.Supp.2d 664, 673 (E.D.La.2007).

Conclusion

For all the aforementioned reasons, Skyline urges this Court to hold: (1) that the federal formaldehyde standards are preemptive of any contrary standard, including any standard which might be imposed by a jury; (2) that ambient air testing cannot be admitted as evidence due to the federal rejection of ambient air testing; and (3) that the savings clause is not an impediment to preemption and summary judgment.

Statement of Relief Sought

For the above reasons, Skyline respectfully asks this Court to answer Certified Question (I) affirmatively and Certified Questions (II) and (III) negatively thereby giving force and effect to the intended preemptive effect of federal manufactured housing statutes and regulations.

Request for Oral Argument

Because this case raises issues of first impression, Skyline requests that this Court grant it the opportunity to make an oral argument to the Court.

SKYLINE CORPORATION,

By Counsel

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Respondents/Plaintiffs below,

v.

Petition No. 082094

From the Circuit Court of
Jackson County, West Virginia
Civil Action No. 05-C-50

SKYLINE CORPORATION, and
GEORGIA-PACIFIC CORPORATION,
Petitioners/Defendants below.

County: **Jackson**

Judge: **The Honorable Thomas C. Evans, III**

Circuit No: **05-C-50**

CERTIFICATE OF SERVICE

I, John R. Teare Jr., of Bowles Rice McDavid Graff & Love LLP counsel for Skyline Corporation do hereby certify that service of the "Brief of Petitioner" was made upon the following by mailing, postage prepaid by United States Regular Mail, of true and exact copies, on this 25th day of February, 2009, to the following:

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